

NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

STEPHEN BOROZNY,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12016
Trial Court No. 3AN-11-10332 CI

MEMORANDUM OPINION

No. 6601 — March 7, 2018

Appeal from the Superior Court, Third Judicial District,
Anchorage, Michael R. Spaan, Judge.

Appearances: J. Adam Bartlett, Attorney at Law, under contract
with the Office of Public Advocacy, Anchorage, for the
Appellant. Ann B. Black, Assistant Attorney General, Office of
Criminal Appeals, Anchorage, and Craig W. Richards, Attorney
General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock,
Superior Court Judge.*

Judge SUDDOCK.

In August of 2008, Stephen Borozny was charged with first-degree assault
for stabbing a woman in her abdomen. At trial, Borozny's defense attorney argued that

* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska
Constitution and Administrative Rule 24(d).

the stab wound, which was relatively shallow, did not amount to the “serious physical injury” required to convict Borozny of first-degree assault — and that Borozny was thus only guilty of the lesser-included offense of third-degree assault. The jury rejected this defense, and this Court affirmed Borozny’s conviction on direct appeal.¹

Borozny subsequently filed an application for post-conviction relief, contending that his trial attorney acted incompetently when he decided to dispute the element of serious physical injury rather than pursuing a mistaken-identity defense.

Superior Court Judge Michael R. Spaan dismissed Borozny’s application, concluding that Borozny had failed to allege facts which, if proven to be true, would have rebutted the presumption that the attorney’s choice of a particular defense was based on sound tactical considerations.

Borozny now appeals the superior court’s dismissal of his application for post-conviction relief. For the reasons set forth in this opinion, we conclude that the judge properly dismissed the application for failure to state a prima facie case.

The State’s evidence regarding the identity of the assailant

Borozny’s application for post-conviction relief contended that any competent defense attorney would have pursued a mistaken-identity defense rather than a defense based on the absence of serious physical injury. To analyze this claim, we first set forth evidence contained in the police reports and the grand jury transcript that the defense attorney would have considered in deciding how to defend the case.

Shortly after 11:00 p.m. on August 18, 2008, Anchorage cab driver Eyayu Asnakew picked up three persons at the Mush Inn Motel. Borozny sat in the front passenger seat, Francis Katongan (a woman) sat behind Asnakew, and Stanley Childers

¹ *Borozny v. State*, 2012 WL 953200, at *3 (Alaska App. Mar. 21, 2012) (unpublished).

Jr. sat behind Borozny. The three passengers, whose identities were unknown to Asnakew, had been drinking together in a room at the Mush Inn. They directed Asnakew to a liquor store near the corner of 11th Avenue and Gambell Street.

Borozny gave Katongan \$50 to purchase beer. When she emerged from the liquor store with an eighteen-pack of beer, she returned change to Borozny — but Borozny concluded that she had short-changed him. Enraged, Borozny exited the cab, opened Katongan's door, and stabbed her in her abdomen. He then retrieved the pack of beer and departed the scene on foot.

Katongan and Childers got out of the cab; Childers walked away, and Katongan stood, bleeding, in front of the liquor store, awaiting help. Asnakew pursued Borozny with his cab. He called the police and provided them with a running commentary about Borozny's location. Asnakew last saw Borozny headed toward some houses on 11th Avenue to the east of Ingra Street.

Police officers soon arrived, and they first searched a back yard on the corner of 11th and Ingra. One of the officers noticed movement in an adjoining back yard. A man who had been lying on the ground stood up and began to walk away. The man, soon identified as Borozny, was stopped by the police. Only twenty minutes had elapsed since the stabbing.

Asnakew had earlier described the assailant to the police as a white male, sixty to sixty-five years old, about five feet seven inches tall, with gray facial hair, and wearing a gray shirt and black jeans. The highly intoxicated Katongan could only describe her assailant as a white male with a goatee who had been staying at the Mush Inn.

When Borozny was stopped by the police, he was wearing a gray or light brown shirt and black jeans. He was fifty-two years old, five feet eleven inches tall, and unshaven. The police discovered a key card to a room at the Mush Inn in Borozny's

pocket. The police asked Katongan, who by then was in an ambulance, whether her assailant was named “Steven,” and she responded that she believed that to be the man’s name.

The police brought Asnakew and Childers to the arrest scene for a show-up. At a distance of twenty feet, Asnakew stated that he could positively identify Borozny as the man whom he had transported and then pursued. Childers also identified Borozny as one of the cab’s occupants.

The grand jury testimony

Borozny declined to be interviewed by the police. As he sat in a room at police headquarters, he threatened to spit on the next officer to enter the room, in an attempt to infect the officer with a disease. Borozny apparently suffered from tuberculosis and hepatitis C. In response to this threat, officers put a face mask on Borozny that prevented him from spitting. They then took a photograph of him.

At the grand jury proceeding, Asnakew was shown this photograph, and testified that, because he could not see the man’s face, he could not identify him. But Asnakew testified that he had positively identified Borozny as Katongan’s assailant at the earlier show-up at the arrest scene. Katongan similarly testified that she could not recognize the masked man in the photograph, although she correctly identified Borozny in other photographs.

Borozny’s application for post-conviction relief

As we have explained, in his application for post-conviction relief, Borozny argued that his defense attorney provided ineffective assistance of counsel because he did not pursue a mistaken-identity defense. But with one exception, Borozny’s application was devoid of factual allegations regarding the relative strength of the

defense attorney's chosen defense that Borozny did not inflict serious physical injury, versus the proposed mistaken-identity defense. For example, the application did not discuss the above-referenced evidence associating Borozny with the crime. Nor did the application refer to Borozny's actual trial defense. The sole exception to this factual vacuum was an allegation in the application that the inability of Asnakew and Katongan to identify the masked man in the photograph shown to them at the grand jury proceeding, plus the fact that no knife was found, provided some basis for a mistaken-identity defense.

Borozny's trial attorney submitted an affidavit in which he stated that he discussed the two alternative defenses with Borozny before the trial, and that he informed Borozny that neither defense bore a strong prospect of success. The trial attorney further stated in the affidavit that Borozny concurred with the defense attorney's decision to dispute the serious physical injury element of first-degree assault rather than to adopt a mistaken-identity defense.

Why we conclude that Borozny's application for post-conviction relief failed to state a prima facie case

Whether an application for post-conviction relief sets forth a prima facie case for relief is a question of law that we review de novo.² The application must "specifically set forth the grounds upon which the application is based."³ We view the factual allegations in the defendant's petition in the light most favorable to the defendant.⁴

² *David v. State*, 372 P.3d 265, 269 (Alaska App. 2016).

³ Alaska Criminal Rule 35.1(d)(4).

⁴ *Steffensen v. State*, 837 P.2d 1123, 1125-26 (Alaska App. 1992).

We employ a two-prong test to evaluate ineffective assistance of counsel claims.⁵ The first prong requires the petitioner to show that the trial counsel's performance fell below the minimum competence of an attorney with ordinary training and skill in the criminal law.⁶ The second prong requires the petitioner to show prejudice arising from the trial counsel's incompetence.⁷

The actions of a trial attorney are presumed to be competent.⁸ In order to rebut this presumption, an applicant for post-conviction relief must not only show that a proposed alternative course of action was superior to the course chosen by the trial attorney, but also that "no competent attorney would have done things as badly as his trial counsel did."⁹

Borozny's application did not analyze the relative strength of his attorney's chosen defense at trial versus the rejected mistaken-identity defense, and it failed to explain why all competent attorneys would have adopted a mistaken-identity defense. Because the application was largely based on conclusory allegations and did not meaningfully analyze the evidence in the case, it failed to state a prima facie case.

⁵ *Risher v. State*, 523 P.2d 421, 425 (Alaska 1974).

⁶ *Id.* at 424 (quoting *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974)).

⁷ *State v. Jones*, 759 P.2d 558, 572 (Alaska App. 1988); *see also Risher*, 523 P.2d at 425.

⁸ *Newby v. State*, 967 P.2d 1008, 1016 (Alaska App. 1998).

⁹ *Tucker v. State*, 892 P.2d 832, 835 (Alaska App. 1995); *Burton v. State*, 180 P.3d 964, 974 (Alaska App. 2008).

Conclusion

We AFFIRM the superior court's dismissal of Borozny's application for post-conviction relief.